MAKING WTO DISPUTE SETTLEMENT MECHANISMS WORK FOR DEVELOPING COUNTRIES: DESIGNING THE STRATEGY OF PUBLIC-PRIVATE PARTNERSHIP

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ABSTRACT

With the advent of globalization and industrialization, the significance of WTO DSU as an international institution of trade dispute governance has expanded tremendously, as a landmark achievement of Uruguay Round negotiations. Exploring the fact that whether the 'pendulum' of DSU is tilted towards developed economies, much to the disadvantage of the developing world, it becomes imperative to devise a strategy within the existing framework, to balance the equilibrium of this tilted pendulum. WTO, being recognized as an area of public international law, and expanding its routes to the sphere of private international law, the approach of public private partnership can be efficiently designed to help developing countries overcome their challenges in using WTO DSU, among the other approaches suggested by various experts. This study aims at exploring ways in which this partnership can be devised and implemented in the context of developing countries and also analyzing the limits of developing countries in implementing this strategy.

***Key words**: WTO, DSU, Developing Countries, International Trade, Public-Private Partnership.*

I. INTRODUCTION

With the advent of globalization and industrialization after the World War II, and the exponential growth of international trade and commerce, the global economic community

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realized the need for an international institution which can play a constructive role in international trade and commerce. During the Bretton Woods Conference, which resulted in the establishment of International Monetary Fund and World Bank, the realization of the thumping need for a comparable international economic institution intensified. Despite global efforts to establish International Trade Organization ("ITO"), its proposal could not pass the US Congress. As a temporary measure, the General Agreement on Tariffs and Trade ("GATT") was adopted to fill the vacuum in international trade. But this temporarily established institution continued to work for over four decades, until it was replaced by the World Trade Organization ("WTO") during the Uruguay Round Negotiations.

The revised dispute settlement mechanism of the World Trade Organization, adopted during the Uruguay Round negotiation in 1995, has been celebrated as one of the most significant and landmark achievement for introducing a rule-oriented and legalized approach for adjudication of international trade disputes between the Member States, to further enhance its efficiency and neutrality. It is also considered as the most *notorious achievement*[2] of the Uruguay Round Negotiations.

It cannot be disputed that the improved and legalized Dispute Settlement Understanding ("DSU") under WTO contains several provisions which offers an advantageous and differential position to developing countries. This special and differential approach towards developing countries is crucial because their role in the WTO DSU is essential for the development of the WTO laws overtime, especially considering the large number of developing countries as WTO Members. But even after analyzing all these advantageous provisions offered to developing countries by the WTO, WTO DSU is far from being accepted and branded as an ideal and impartial institution. The fact remains that developing

[2] P. Grane, *Remedies under WTO Law*, (2011) ***Journal of International Economic Law*** 755-772.

countries' participation in the WTO DSU as complainants, especially against developed countries has diminished after the birth of the WTO, as compared to the traditional GATT practices.[3] The developing countries are one-third less likely to file complaints against developed States under the WTO than they were under the post-1989 GATT regime.[4] In contrast, the fraction of cases targeting developing countries has risen dramatically, from 19 to 33 percent suggesting that they are five times more likely to be challenged by developed nations.[5] This situation of imbalance within the WTO DSU has to be balanced to establish an effective and impartial system of international dispute settlement of trade disputes.

There have been dozens of reforms and strategies suggested by various experts to aid developing countries overcome the impediments in participating at WTO DSU. To address these concerns and to ensure greater integration by the developing countries in the WTO DSM, India along with other Like Minded Group of Members have, inter alia, tabled proposals like Dispute FUND (for accumulating resources to fight WTO litigation)[6], Cross-retaliation (for strengthening enforcement mechanisms), concretizing the Special and Differential elements without disturbing the legal nature of DSM.[7]

But drawing inspiration from the words of a wise man that 'charity begins at home', it will be of immense interest and importance to devise a strategy which can be designed and implemented in-house, i.e. within and by the developing nation, without changing the existing state of affairs at WTO DSU or without looking at the developed world with a ray of

[3] G. Shaffer, *How to Make The WTO Dispute Settlement System Work for Developing Countries: Some Proactive Developing Country* Strategies, (2003) **ICTSD Resource Paper No. 5** 5-11.
[4] *Ibid*.
[5] *Ibid*.
[6] Article 28, *Report on Consolidated Draft Legal Text' proposed at The Special Session of the Dispute Settlement Body* (July18th, 2008) at 19.
[7] Interview with Ujal Singh Bhatia, Ambassador/ Permanent Representative of India to the WTO, dated 9th April 2010.

hope. This can be done by designing a public-private partnership in order to fight WTO litigation. This approach has, like any other partnership, its own limitations, but can be used as a powerful and effective weapon in the hands of developing countries to overcome their challenges and come on the level playing field of WTO DSU, along with developed countries nevertheless.

The optimistic expectations of the developing countries remaining unfulfilled, the questions which arise during this study are as follows:

1. Is it practical to change or modify WTO DSU rules in order to make it even friendlier towards the developing countries or is it more sensible and pragmatic to devise a strategy for the advantage of developing countries, without making any changes or modifications in the present legal system, such as a public-private partnership model?
2. How far can the strategy of public private partnership, as introduced by the US and as followed by the EU, pragmatically be adopted by the developing countries to overcome their main obstacle of scarce varied resources[8] for fighting a successful WTO litigation?

These are a few emerging questions and, embedded in them are the challenges and opportunities, which this study identifies and explores.

The vision of this study is designing a strategy within the present framework of the WTO DSU of public private partnership in fighting WTO litigation, and making it work for developing countries. Devising a PPP at WTO DSU, after drawing experience from the US, the EU and Brazil, the paper ultimately focuses on analyzing the pragmatism and suitability of this strategy in context of developing countries. The paper aims at serving as a "catalyst"

[8] By varied resources, the paper refers to monetary, legal, informative, administrative and political resources owned and possessed by the private sector.

for further research to explore the possibility of implementing the PPP model in developing countries and designing various ways in which it can be successfully implemented.

II. DEVISING THE STRATEGY TO OVERCOME CHALLENGES: DEVELOPING COUNTRIES PERSPECTIVE

There have been various valuable and well researched strategies suggested by prominent experts and authors, in context of developing countries.[9] But the major problem with the voluminous set of current proposals is that there are so many of them! Developing countries seem to betting on all the horses in the race. That, of course, is never a winning strategy.[10]

The strategy of this study would be to bet on only one horse: Public-Private Partnership ("PPP").

Before proceeding with devising the PPP model, a cautionary word is in order. Even if a PPP can be effective as a strategy for developing countries to overcome their challenges, it is obviously just one of the several factors that may contribute in the developing countries

[9] Various other approaches and strategies have been suggested by prominent authors in context of developing countries, like: 1. Working with the Advisory Centre on WTO Law, NGO's, consumer groups and technological agencies suggested by G. Shaffer in *The Challenges of WTO Law: Strategies for Developing Countries Adaptation,* (2006) 5(2) ***World Trade Review***177-198. 2. The role of the Advisory Centre on WTO Law, role of WTO Secretariat, regional centers, academicians, domestic political groups and organizations suggested by M. Aydin, *WTO Dispute Settlement Mechanism and Developing Countries: Lessons for Turkey*, (2007) ***Fletcher School of Law and Diplomacy***. 3. The special WTO prosecutor for developing countries, technical assistance by the WTO, direct applicability of the WTO Law in national courts, differential time frame, training of judges on S&D provisions, joint action by developing countries suggested by Asif H Qureshi, *Participation of Developing Countries in the WTO Dispute Settlement System,* (2003) 47(2) ***Journal of African Law*** 174-198. 4. Legal service centre, law schools, *pro bono* work by law firms, NGO's, consumer organizations and official development organizations suggested by C. P. Bown and B. M. Hoekman, *WTO Dispute Settlement and the Missing Developing Country Case: Engaging the Private Sector,* (2005) 8(4) ***Journal of International Economic Law***.

[10] M. Bronckers and N. Van Den Broek, *Improving the Remedies of WTO Dispute Settlement,* 8(1) ***Journal of International Economic Law*** 101–126.

context and the world trading system generally. The importance of other strategies, such as financial compensation, retaliation, legal assistance by the Advisory Body of the WTO and other measures should never be disregarded by the developing countries' representatives and actors interested in improving the standing of developing countries in the WTO DSU. The importance of other strategies and measures therefore being well recognized, this study will focus all its energy on critically analyzing and devising the PPP model in the context of developing countries.

This approach can be implemented for benefitting developing nations without modifying the existing structure and rules of the WTO DSU, and has been scantly researched and hence calls for further research and analysis.

There are two routes for addressing the concerns of developing countries over their hindered and imbalanced access to the dispute settlement mechanism under the regime of the WTO. One is to substantially diminish the cost and complexity of the litigation process under the WTO through reforms and modifications. The other is to accept the system as such and explore the ways to bridge the gap between developing and developed countries to access resources (financial, legal, political and administrative) and devote them fully to the legalized and complex litigation under the WTO. Within the model of a PPP, as a remedy to construct this bridge, the study will focus on this second approach.

In the following sections, the paper discusses the concept and vision of the PPP, followed by the enriching experience and strategies of the leaders, i.e. the US, followed by the EU and Brazil, who initiated this network campaign to strengthen their standing at the WTO DSU. After discussing these experiences, the paper will then thrash out the reasons behind the significance of this network as a weapon and tool for developing countries to improve their standing at the WTO DSU and make its effective utilization, as against the developed

countries. We will then critically analyse the potentiality and acceptability of this approach in context of developing countries, along with the limitations which the developing countries might face in implementing this network, while walking on the path of glorious victory in international trade disputes.

III. DEVISING PUBLIC-PRIVATE PARTNERSHIP IN CONTEXT OF DEVELOPING COUNTRIES

According to the English Political theorist R.A.W.Rhodes, 'western societies increasingly are governed through "self-organizing, inter-organizational networks" composed of public and private actors pursuing shared goals.'[11]

WTO Law while formally considered as a species of public international law, profits private interests relating to commerce and trade. Large, well connected and highly organized private parties in the form of business and commercial units and industries, make use of the WTO legal system to satisfy their commercial aspirations. But this expansion of WTO law in the realm of private international law is not unilateral. It is reciprocal in the sense that the interested industries and commercial units have proved to be the backbone of the governments to fight the highly complex and legalized WTO litigation. This highly organized and powerful private sector becomes the source of varied resources, i.e. financial, legal, administrative and informative resources which are sought for in voluminous amounts under the newly established WTO DSU.

This growing interaction between public sphere of governments, public officials, ministry and the private realm of industries, enterprises, their lawyers reflects a shifting trend from

[11] R.A.W Rhodes, *The New Governance: governing without Government,* (1996) 44 ***Political Studies*** (1996) 660.

governmental decision making towards decision making motivated by private considerations, through direct public private interaction in WTO litigation. Hence, the traditional understanding of WTO law as public international law has undergone significant transformation and has expanded its roots to the private international law, through the active participation of the private sphere and its influence on private interests.

This interaction between the public and private forces is sometimes termed as "neo-liberalism". Neo-liberalism refers to a situation 'where the government and societal interests give way to private forces to foster the play of market forces driven by private enterprises pursuing profit-maximization.'[12]

The role of the non-state actors (private sector/ NGO's) in WTO DSU is also implied in Article 13 of the DSU as it grants authority to the Panel/AB to seek information from "any relevant source". Thus, even though the private sector may lack *locus* to represent their trade interests directly at WTO DSB, yet they may present *Amicus* Briefs to the Panel/AB for consideration if the latter chose to do so.[13] Hence, if the WTO DSU has impliedly made a provision to extract informational and evidentiary inputs from the non-state actors, including the private sector, why cannot this informational exchange happen at the national level in an institutional and legalized manner, through a reciprocal model of PPP for fostering the governmental ability to have wider access to informational and evidentiary resources? This provision also has its limitations and is opposed by many developing countries, e.g. India. India does not support private participation or role as amicus curiae because it believes that this provision destroys the intergovernmental nature of WTO DSU

[12] *Ibid*, note 4-5.

[13] ***Simon Lester and Bryan Mercurio et al, World Trade Law: Text, Materials and Commentary, (2008),*** at 198-199.

and also that the private sector looks into their narrow private interests, which can be detrimental to the larger national interests.[14]

The most significant purpose behind the emergence of this network of two isolated and separated worlds is the *resource interdependencies*. The litigation at the highly legalized WTO DSU calls for an extensive amount of varied resources in the financial, legal, administrative as well as informative form. It is highly unlikely for the government or public body to possess or devote such voluminous amount of these varied resources in fighting WTO litigation, especially in the case of developing countries. As Jan Kooiman states, 'No single actor, public or private, has all knowledge and information required to solve complex, dynamic and diversified problems.'[15] As Walter Powell writes, 'A basic assumption of network relationships is that one party is dependent on resources controlled by another, and that there are gains to be had by the pooling of resources.'[16]

The relative and comparative influence of actors within this network is determined by their *possessed resources and stakes per capita* in the outcome of the trade dispute. The public actors possess constitutional and legal power to bring a case to the WTO DSU as a member state whereas the private actors possess financial, organizational, political, managerial, legal and informative resources. Hence, the concept of reciprocity through PPP between these two actors puts the car in motion by amalgamating their respective resources for mutual benefits and common objectives. But these resources alone do not fully and completely justify the reason behind this partnership. Since the aim of every private enterprise and industry is to maximize profit and benefits with the least amount of resources possible, their

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[14] Interview with Ujal Singh Bhatia, Ambassador/ Permanent Representative of India to the WTO, dated 9th April, 2010.

[15] ***J. KOOIMAN, MODERN GOVERNANCE: NEW GOVERNMENT-SOCIETY INTERACTIONS,*** (1993). See G. Shaffer, *supra* note 3, 14.

[16] W. Powell, *Neither Market nor Hierarchy: Network Forms of Organization* in ***Markets, Hierarchies & Networks: The Coordination of Social Life*** (1991). See Gregory Shaffer, *supra* note 3, 15.

participation in this international network also depends to a great extent on their "*relative stakes in the outcomes*"[17] of the trade disputes, as compared with the varied resources invested in the preparation, representation, fighting and enforcement of the outcome.

As Neil Komesar writes:

> 'The character of institutional participation is determined by the interaction between the benefits of that participation and the costs of that participation….Interests groups with small numbers but high per capita stakes have significant advantages in political action over interest groups with large numbers and smaller per capita stakes.'[18]

Hence, an amalgamation of resource interdependencies, the actor's relative stake in the outcome and sharing of common goals and objectives fosters the growth of a PPP in fighting WTO litigation.

A.

IV. LESSONS LEARNT FROM THE US, EU AND BRAZIL EXPERIENCE

Thanks to its close network with the private sector for fighting trade disputes at WTO, the US, the EU and Brazil have been seen as the most enthusiastic users of the WTO DSU. Being the most developed and powerful countries in this era, US and EU also realized the need for support from the private sector to represent their interests and goals at an international level and hence entered into the reciprocal network of the PPP. If these highly developed countries look at private sector for resources to be invested at the WTO litigation, how can the developed countries expect a developing nation to successfully initiate and represent the

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[17] ***G. Shaffer, Defending Interests: Public-Private Partnership in WTO Litigation***, (2003) at 16.

[18] ***N. Komesar, Imperfect Alternatives: Choosing Institutions in Law, Economic and Public Policy***, (1994), at 868.

case under the WTO DSU, investing a voluminous amount of varied resources, without any external support? Let us take up the cases of US, EU and Brazil individually and analyze their need for this public private network and the way they emerged this network, along with its success rate.

4.1 THE US SYSTEM

a.

The United States being the first country to establish this bonding with the private sector, it introduced Section 301 procedure (Articles 301-310 of the Trade Act of 1947) which enables US private firms to approach the office of the United States Trade Representative ("USTR") for convincing them to start an inquiry about a foreign trade barrier or WTO inconsistent policy. Gregory Shaffer examines Section 301 as a 'mechanism within a broader informal process of public-private coordination behind US challenges to foreign trade barriers.'[19] Established in 1962, USTR assumed the authority to decide on Section 301 issues in 1998 from the President.[20] Since USTR has to report to the President as well as to the Congress, the industries can exert pressure through the Congress over USTR to pursue the investigations and initiate a case at WTO. Hence, USTR does not only represent the US government policies and interests, but is also obliged to represent the business and commercial interests of the private sector.

This amalgamation of Section 301 and the USTR structure and functioning gave rise to the public private network, for the purpose of solving trade disputes at an international level. 'Section 301 constitutes a specific legal provision for private solicitation of public assistance on trade matters.'[21] It forms part of an informal network of public and private sector, with

[19] G. Shaffer, *supra* note 17 at 20.

[20] M. Aydin, *WTO Dispute Settlement Mechanism and Developing Countries: Lessons for Turkey*, (2007) **Fletcher School of Law and Diplomacy** 23-24.

[21] G. Shaffer, *supra* note 17 at 27.

the intermingling of their interdependent varied resources, to satisfy their reciprocal and mutual interest in this globalized atmosphere of trade and commerce. For example, in the *EC-Meat Harmones* case, 'the beef industry likewise pressed the USTR to take its case to the WTO and to retaliate against the EC for failure to comply with the WTO Appellate body's ruling.'[22] The beef industry also exerted an enormous amount of pressure on USTR through the congressional representatives.[23]

This growing public private network in the US is evident from the increasing tendency of the industries to hire law firms specialized in international economic law to assist them, along with the growing demands of the WTO process. To take an example, the distilled Spirits Council hired Micheal Hathaway of Nalls, and Korea hired a Brussels-based attorney, Marco Bronckers in the Korea-Alcoholic Beverages case.

Hence, the US has set an example as a leader and initiator of this strong and reciprocal network to strengthen its standing at the WTO litigation, and has also been instrumental in shaping the WTO law and its usage by the member states.

4.2 THE EU SYSTEM

The counterpart of the Office of the USTR in Europe is the Trade Directorate-General of the European Commission (EU Commission). Like the USTR, the EU Commission also depends upon the mutually advantageous PPP model for its success in the WTO litigation.

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[22] *See*, Interview with Representative from the National Cattlemen's Beef Association on May 20, 1999 at 39, in ***G. Shaffer, Defending Interests: Public-Private Partnership in WTO Litigation***, (2003).

[23] *Ibid.*

However, the EU PPP operates quite differently from those in the United States. The European Commission being a member driven commission, individual members can impede the commission's endeavours to litigate a trade dispute before the WTO. Moreover, many firms and enterprises in Europe remain predominantly nation-based and have fewer contacts with the European commission. But the commission has increasingly made efforts to foster this relationship by encouraging the private sector to participate actively in the international trade matters and trade litigations.

Along with the EU commission, a Market Access Unit was also established in 1997 within the Directorate-General of the European Commission 'which interacts with private sectors and creates immense database listing trade barriers by sector and country.'[24] Besides this, a Market Access Action Group has been established to investigate the presence of violations of WTO obligations or other bilateral agreements and their impact on the EU. Since the commission is inadequately staffed, just like the USTR, it calls for the assistance from the private sector and relies significantly on the resources of the private sector to represent and fight a trade dispute before the WTO.[25] Hence, 'the European private sector can cooperate with the commission on international trade issues by bypassing national authorities like Article 133 committee or the council.'[26]

The Commission has fostered the growth of the PPP through establishing formal and informal mechanisms in the framework of its Market Access Strategy and Trade Barrier Regulation.

The *Japan-Alcoholic Beverages* case, concerning alleged tax discrimination in favour of Japanese producers of *shochu*, 'fostered the industry to work with the commission in the

[24] *See* The EU Market Access Database (*available at* http://mkaccdb.eu.int).
[25] M. Aydin, *supra* note 20 at 27.
[26] G. Shaffer, *supra* note 17 at 78-83.

EC's successful WTO complaints against South Korean and Chilean tax practices that favoured their local beverages, *soju* and *pisco*.'[27]

The presence of the European Commission, the establishment of Market Access strategy, the Trade Barrier Regulation, periodical meetings, and practical examples such as the *Japan-Alcoholic Beverages* case, participation by Scotch Whisky Association and French Associations, proves beyond doubt that the European Union is seriously interested in fostering this network and realized its significance by observing the enriching US experiences.

Hence, the US and the EU have rightly been called leaders in introducing the concept of PPP to effectively and strongly fight WTO litigation and lay down an example for the other nations to follow.

4.3 BRAZIL EXPERIENCE

Since the thrust of the research is in the context of developing countries, it becomes interesting and also crucial to learn about the successful implementation and functioning of a PPP in a developing country, although counted amongst the more powerful economic structures in the world, Brazil. It will be rather valuable to study the structure of the PPP operating in Brazil and then designing a mechanism which can be implemented, at least in the other developing countries, with similar socio-economic conditions, like India, South Africa and China.

[27] G. Shaffer, *supra* note 17 at 100.

Brazil has travelled significantly towards institutionalizing this partnership within WTO DSU and ever since initiating this model, Brazil has become an enthusiastic participant in the system.[28] The model consists of:

> 'Three pillar institutional structure of WTO DSU, consisting of a 'WTO dispute settlement division/unit located in Brasilia (first pillar), coordination between this unit and Brazil's WTO mission in Geneva (second pillar), and coordination between both of these units with Brazil's private sector and law firms hired by it (third pillar).'[29]

The dispute settlement unit works in close association with the concerned private sector.[30]

> 'The dispute settlement unit is responsible for analyzing the legal and factual grounds for a complainant before the WTO, defining strategies, preparing and, if applicable, overseeing outside lawyer's preparation of, legal submissions, and participating in hearings before WTO panels and the Appellate Body, being well shadowed and supported by the private sector.'[31]

The private sector in Brazil shadows and operates behind the dispute settlement unit via academia, trade associations, think tanks, consultancies and elite law firms, possessed and hired by private sector players.

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[28] Interview with Official from Brazilian Ministry of Foreign Affairs, Brasilia, Brazil on April 19, 2004. *Also see* C.P. Bown and B. M. Hoekman, *WTO Dispute Settlement and the Missing Developing Country Case: Engaging the Private Sector*, (2005) 8(4) ***Journal of International Economic Law***.

[29] G. Shaffer, M. Ratton Sanchez and B. Rosenberg**,** *Brazil's Response to the Judicialized WTO Regime: Strengthening the State through Diffusing Expertise* ***Working draft commissioned by ICTSD as part as part of ICTSD's project on WTO Dispute Settlement and Sustainable Development, Brazil*** (22-23 June 2006).

[30] *Ibid*.

[31] *Ibid*. The detailed version of the working of PPP model in Brazil at WTO DSU is not being included in the dissertation because of the word-limit. For its detailed study, see G. Shaffer, *supra* note 29.

This "three pillar" institutionalized model of the PPP has significantly strengthened Brazil's domestic capacity by expanding governmental access to varied resources owned and possessed by private sector and it has emerged as a leader amongst developing countries to devise this innovative strategy of PPP to claim or to defend before WTO DSB. But, considering the heterogeneous nature of developing countries, this study will not insist on adopting any model followed by above countries, but will analyze and propose strategies to devise the PPP model, which can be adopted by varied developing countries, with minor modifications to suit their needs and circumstances.

B.

V. MAKING IT WORK FOR THE DEVELOPING COUNTRIES

After analyzing the origins of PPP in international trade law, and examining the experiences of the leaders of this strategy within the developed world, US and EU, along with experiences of Brazil, a leader of this strategy emerging from the developing countries, it becomes imperative to focus specifically in the context of developing countries. It is necessary to discuss how the PPP will work and function in developing countries and will assist them in strengthening their standing at WTO DSB, bringing them at par with the developed countries to fight WTO litigation.

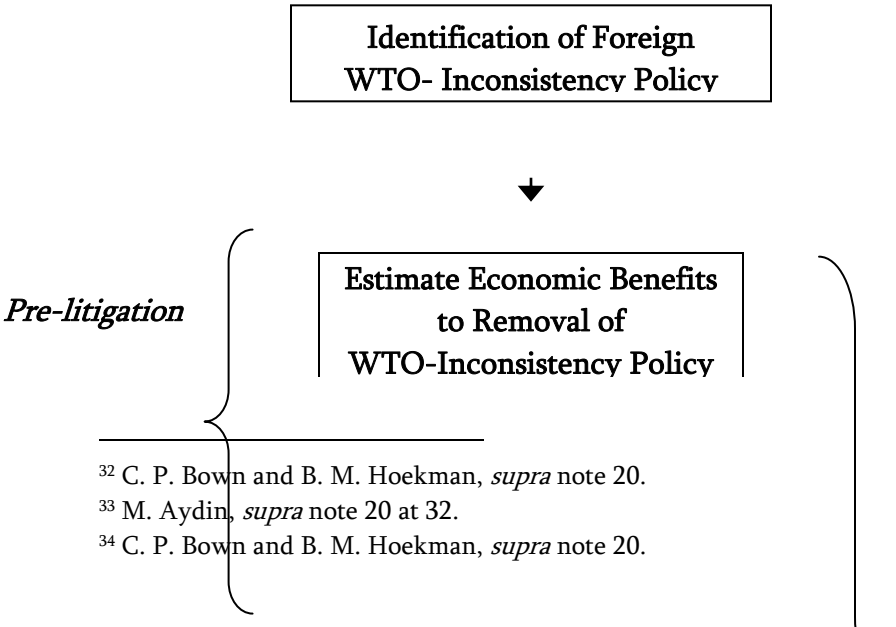
Developing countries suffer from the acute shortage of resources (monetary, legal, informative and administrative) which are highly sought for in WTO litigation under the improved DSU. Information required in investigating foreign trade barriers and fighting WTO litigation on its detection comes most quickly and efficiently from the private industries and enterprises suffering from the foreign trade barrier. Yet another most significant resource for WTO litigation is legal cost and services. The private industries in this partnership hire a law firm who investigates and identifies a trade barrier, formulates the

litigation agenda, and argues the matter before the WTO DSB, while shadowing the public authority empowered to represent before WTO DSB.

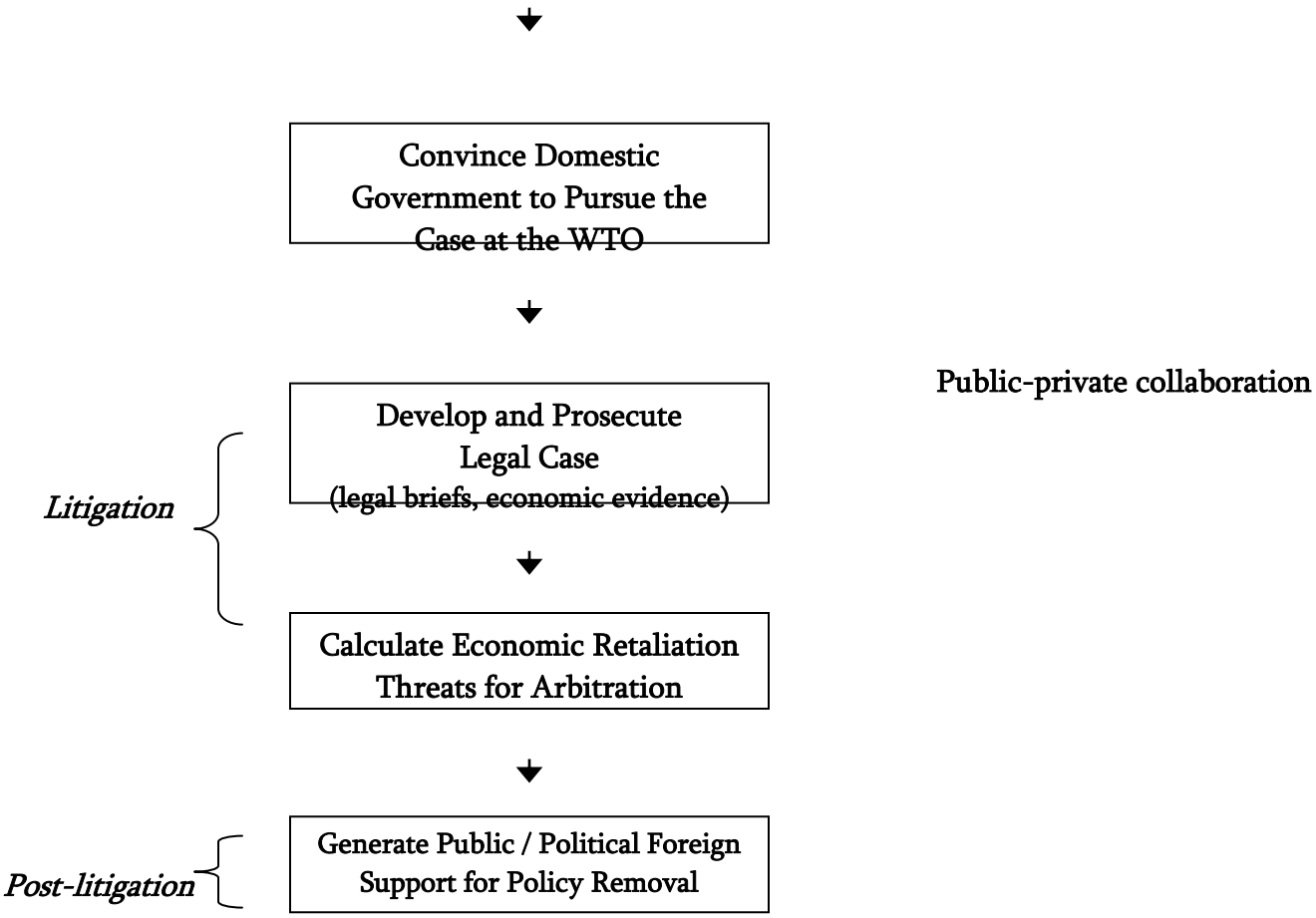
> 'It is a combination of firms, industry associations, private sector attorneys and consultants that do much of the pre-litigation and behind the scenes work forming the line of arguments and issues to be presented by the public officials at WTO DSB.'[32]

Hence, developing countries should set it as a priority to improve and foster their networks with the private sector, and 'identify, prioritize and investigate trade barriers in coordination and cooperation with them'.[33] The public private network at WTO DSU in developing countries will enable the developing countries to overcome most of the difficulties and problems discussed above which hinders them to use the WTO DSU efficiently and puts developing countries on a disadvantageous edge as against the developed countries.

To have a clear understanding of how the PPP model will work in developing countries to fight WTO litigation, we will take assistance of a diagrammatic representation derived from Bown and Hoekman[34], which will explain the working of this partnership process during WTO litigation, step by step.



[32] C. P. Bown and B. M. Hoekman, *supra* note 20.
[33] M. Aydin, *supra* note 20 at 32.
[34] C. P. Bown and B. M. Hoekman, *supra* note 20.



The above diagrammatical representation, as propounded by Chad P. Bown and Bernard M. Hoekman, provides a felicitous illustration of the role of the private sector in the mechanism of the PPP model in the WTO litigation and focuses on the various steps which lead to a successful network of public private sector.

At the *first stage*, the private industries and enterprises will undertake legal research through hired law firms to investigate the existence of a foreign trade barrier or a foreign WTO-inconsistent policy and prepare the evidence, databases and arguments necessary to convince the government officials of the existence of a foreign trade barrier or a foreign WTO-inconsistent policy and about the pressing need to pursue the case within the WTO DSU.

This involves massive investment by the private players as the WTO system is highly complex and legalized and it requires massive legal expertise in international trade law to fight a case under the WTO DSU regime.

At the *second stage*, after the private players have identified the foreign trade barrier or a WTO-inconsistent policy which is existing to the detriment of their business, the private players then analyze and calculate the economic costs of participating and assisting the government in the case filed at WTO DSU challenging the trade barrier or policy. In calculating the economic costs, they take into account the costs incurred for hiring expert law firms, hiring investigation mechanisms for informative resources, investing administrative staff, and influencing political arena to exert more intense pressure on the public body to pursue the case at WTO DSB. In reaching a decision of whether to participate in the specific trade dispute along with the public sector, the private sector after calculating the estimated economic costs, compares the cost with the per capita stake involved in that trade dispute. If the per capita stake involved is higher, as compared to the estimated cost, the private sector will go ahead with this partnership. It will also investigate economic benefits which will accrue to the nation with the removal of this trade barrier in order to convince the public officials of the case.

At the *third stage*, the private sector approaches the domestic government through its specialized public body established to handle international trade matters either through a legal statutory provision or through representation in some other way in the absence of such statutory provision. As an example to these provisions, the US has enacted Section 301, the EU has enacted Article 133 of the Process and the Trade Barrier Regulation, and Brazil has established the Dispute Settlement Unit in Brazil, where industries and firms can petition the competent public authority to take up the issue of foreign trade barrier or a foreign WTO-

inconsistent policy and convince them to pursue the case under the WTO DSU regime.[35] Hence, it is imperative for a developing country to make a provision for such statutory clauses to empower the private sector to approach the public sector legally and with authority. At this stage, the private sector makes all possible efforts to convince the competent public body to pursue the case at WTO. Apart from the legal, economic and informative position, the private sector also makes use of the political pressure on these bodies.

At the *fourth stage*, if the government is convinced of the legal and economic arguments and rationale presented by the private sector and agrees to pursue the case before the WTO DSB, the private sector gives instructions to their law firms, attorneys and consultants to assist the competent public body in the preparation of the formal legal briefs and documents of economic evidence for being used in presenting the case before the WTO DSB. This is a very complex and tedious process as the litigation at WTO requires voluminous amount of legal expertise in international trade law and documentation. The *EC Bananas* case, for example, 'involved over a dozen claims under four WTO agreements. The initial panel decision alone was over four hundred and seventy pages.'[36] 'Much of the US factual description, to fight the WTO litigation, had, in turn, been prepared by Chiquita and its lawyers.'[37] Hence, it is imperative for developing countries, who suffer from inadequate and insufficient legal expertise, to engage the private sector in the WTO litigation to improve their legal expertise and expanding the access to legal service resources in order to strengthen their standing before the WTO DSB. Hence, the private sector in this way acts as the shadow of the governmental body while fighting the WTO litigation.

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[35] C. P. Bown and B. M. Hoekman, *supra* note 20 at 869.

[36] The relevant WTO Agreements were GATT (1994), GATS, TRIMS, and the Licensing Agreement.

[37] Interview with USTR Official in May, 1999, in ***G. Shaffer, Defending Interests: Public-Private Partnership in WTO Litigation***, (2003), at 39.

At the *fifth stage*, after challenging the trade barrier and conducting the WTO litigation, the next important issue lies in the enforcement of that decision rendered by WTO DSB, which does not have a sanctioning authority, and is a judicial function without sharp teeth. This is one of the biggest obstacle, as discussed, for the developing countries to use WTO DSU, in order to ventilate their international trade grievances, because even if a developing country wins a case at WTO against a developed country or a powerful developing country after all the hardships, it fails to get that decision enforced in its favour, and as against the developed country. Hence, the private sector may also play an instrumental role in inducing foreign compliance with DSB rulings, by analyzing the economic retaliation threats as authorized by the DSB for arbitration. This is a very crucial function played by private sector, especially in developing countries which faces major problems of enforcement.

At the *sixth stage*, being the final and post litigation stage of the WTO litigation, the private sector plays another crucial and non-replaceable role, especially in context with developing countries, through its engagement in a public relation making with other nations to increase the political as well as public cooperation required for the said purpose. This informal campaigning with the foreign officials abroad can only be undertaken by private sector, and will prove to be absolutely essential at the enforcement stage for a developing country, especially when the DSB ruling is against a developed and powerful nation.

Therefore, a successful public private collaboration to challenge a foreign trade barrier requires intensive inter-firm and inter-departmental cooperation, enormous amount of information exchange between the private and public players, strategies to exert pressure on the foreign governments to remove the barrier or obey enforcement of the WTO ruling, and

fostering political influence in order to exert intensive pressure on the domestic public authorities.[38]

Brazil, being a developing country, has gone a long way in implementing the PPP model at WTO DSU by adopting varied strategies and taking support from various avenues. Let's briefly analyze the various strategies adopted by Brazil which could successfully be adopted by other developing countries to design the PPP model.

1. Internship Program at Brazilian Mission at WTO[39]

   The Brazilian mission at WTO started a four month Internship Program from September 2002 'to facilitate the training in WTO law and dispute settlement of young attorneys and postgraduate students'[40], financially supported by private law firms. This program has been established as a joint initiative of governmental officials and private law firms to increase the knowledge and expertise of WTO law in Brazil. Other developing countries can derive lessons from this initiation and embark on introducing internship and training programs at their respective missions at WTO to enhance the in-house expert capacity of their nations as a result of young professionals and students pursuing advanced studies in WTO Law.

2. Role played by Media[41]

   'The Brazilian media has played an important role in increasing public awareness of WTO rules and their impacts on the Brazilian economy and society.'[42] Their efforts in promoting the PPP model have gone to the extent of journalists taking trainings on WTO matters and introducing such courses for journalists as "trade for journalist's

[38] G. Shaffer, *supra* note 17 at 31.
[39] G. Shaffer et al, *supra* note 29.
[40] *Ibid.*
[41] *Ibid.*
[42] *Ibid.*

course" by special bodies like the Sao Paulo American Chamber of Commerce (AMCHAM) and ICONE, DireitoGV and other academic institutions. The other developing countries can also utilize the media to enhance awareness in the private sector of the impacts of WTO law on the commercial and business prospects of a nation and hence foster the PPP model to fight WTO litigation. This will also help to change the attitude of government towards the public international law nature of WTO law, furthering their insight into the private international law dimension of the WTO law and the growing need of private sector participation in WTO DSU.

3. Role played by legal education[43]

Brazilian university departments and courses have undergone significant changes in the last few years in response to the "globalization" and increasing focus on international trade.[44] The formation of informal study groups by WTO expert professionals like NESC[45], introduction of short dispute settlement courses by UNCTAD in 2004 with FGV's assistance and the organization of seminars, workshops, conferences and meetings to make a contact point for Trade law professionals further prove the crucial developments in Brazil in the academic sector to foster the public private collaboration.

4. The emergence of think tanks, consultancies and networks[46]

> 'Brazilian entrepreneurial individuals have created profit-based and non-profit-based consultancies and think tanks that have developed technical and economic research capabilities to advise and assist the public and private sector on WTO related issues, leading examples

[43] *Ibid*.
[44] The Brazilian law schools like University of Sao Paulo, FGV Law School started offering varied trade-related and WTO related courses, from undergraduate to the PhD level.
[45] Nucleo de Estudos Sobre Solucao de Controversias, formed in 2004 in Brazil.
[46] G. Shaffer et al, *supra* note 29.

> being the Institute of Studies on Trade and International Negotiations (ICONE), DATAGRO and Prospectiva Consultants.'[47]

> Many other non-profit-based initiatives like conducting research, organizing symposia, etc, by IDCID, REBRIP, GNC, CESA, as few organizations amongst many in Brazil, have been going on. Other developing countries should encourage the establishment of these private groups and organizations for nurturing their international networks, as these groups are better informed of the latest developments nationally and internationally and are better equipped to provide the analysis of the various issues and trade matters, legally, economically, politically and socially.

This model can also widely be observed in India, although through informal channels.
It can be verified with what the Indian Ambassador to the WTO expressed in his personal interview:

> 'As far as India is concerned, there is no such formal mechanism established under our domestic law for public private partnership in contesting cases in the WTO. However, over the years, a pattern of coordination between the Government and the business community has emerged in determining the need to take up a matter in the WTO and in pursuing the case. The recent case brought by India against the United States on the CBD requirement (*DS345 C Bond* case) on shrimp imports can be cited as a good example of this coordination. The industry represented by Seafood Exporter's Association presented detailed facts and figures about the problems it was facing to MPEDA, a Government sponsored Body acting as an interface between the government and the industry. Based on the recommendation of

[47] *Ibid.*

> MPEDA, the government made a detailed legal evaluation of the issues in terms of WTO provisions. The industry was closely involved with the preparation of legal briefs and in providing answers to the questions raised in the panel and AB hearings. This example reflects the emerging pattern of consultation and collaboration in India in pursuing dispute cases in the WTO.'[48]

These experiences and strategies adopted by the above discussed countries can be evaluated by the concerned developing countries and a country-specific PPP model can be devised through these strategies and similar ones, with some modifications to suit the specific needs of their socio-economic and political conditions.

VI. LIMITATIONS OF DEVELOPING COUNTRIES (AND POSSIBLE SOLUTIONS)

Although the PPP has proved to be an effective means to successfully fight WTO litigation by a developed country, it is also imperative to examine what challenges and obstacles will be faced by developing countries in implementing this model.

The *first reason* which limits the development of this useful network is the lack of collective organization in the private sector industries in a developing country. This public private collaboration calls for a highly organized and united industry to strongly convince the competent bodies to challenge the foreign trade barrier or foreign WTO-inconsistent policy which is operating to the detriment of the commercial goals of their industry. It is absolutely essential to represent a broader industrial or national interest in challenging the discussed policy or barrier in order to convince the body/authority to fight WTO litigation. Hence, in

[48] Interview with Ujal Singh Bhatia, Ambassador/ Permanent Representative of India to the WTO, dated 9th April 2010.

order to effectively implement this collaboration in a developing country, it is imperative to encourage collective organization amongst the industry which will further foster the ability of the private sector to strongly challenge a barrier or policy, through the public sector.

Secondly, since this collaboration is based on the principle of reciprocity, when the private sector assists government in challenging the foreign trade barrier at WTO DSB, investing a voluminous amount of varied resources, the private sector expects commercial gains and profits with the removal of the trade barrier or policy, higher than the resources invested. If the per capita stake involved in challenging the trade barrier is lower than the estimated cost involved, the private sector will not go ahead with further investigation and assisting the government in fighting WTO litigation. The problem with developing countries here is that the market-access of developing countries acquires an insignificant and minor proportion in comparison with the developed countries and hence these developing countries share a minor interest in challenging a foreign barrier or a policy which is operating to their detriment. Because of the lower margins in the exports, these private industries in developing countries are often not in a position to assist the government and devote voluminous amount of their resources to the WTO litigation.

Even if the developing countries overcome the problem of collective organization and relative stakes versus estimated costs criteria, the *third problem* faced by these countries arises because of the lack of legal and institutional 'entry' routes to pressurize their government to challenge the trade barrier or policy operating to their detriment.[49] Taking examples from the leaders in this strategic collaboration, Section 301 in the US, Article 133/TBR like policy instruments in the EU and the three-pillar model in Brazil, establishes a gateway for the private sector to legally approach and petition the public authorities/bodies like USTR in the US and European Commission in the EU and the Dispute Settlement Unit

[49] C. P. Bown, *supra* note 32 at 871.

in Brazil to challenge the barrier or policy at WTO DSB. While it is not the case that these provisions are used in all the trade dispute cases, the mere presence of entry channels encourages the private sector to engage in exporting interests and work in collaboration with the government in the arena of international trade. Hence, it is imperative for the developing countries to establish these statutory provisions and public sector counterparts/competent authorities to provide an entry route to the private sector to approach the government for matters relating to international trade issues with a legal standing to petition the authorities under the statutes.

The *fourth reason* which is linked with the above point is that a successful public private collaboration requires a public sector partner which has been constitutionally empowered, both legally and administratively, to handle the matters of international trade disputes along with the private sector and represent their interests at WTO.[50] Establishing and maintaining a separate specialized body for this purpose requires investment of the already scarcely available administrative resources in many poor and developing countries. Hence, this will involve a strategic allocation of administrative capacity by or from the Foreign affairs ministry and trade and commerce ministry to establish such a specialized body. But this collaboration with the private sector can rectify this problem to a significant extent, with the inflow of administrative and human resources from the private sector.

Fifthly, there is a lack of expertise in international trade law in developing countries, which is called forth most importantly to fight WTO litigation. This is because of many factors. There is no motivation for a lawyer to specialize in international trade law or WTO law if that lawyer has to practice domestically. This is because of the narrow scope of opportunities in developing countries for the international trade law experts to be hired by governments and states on a regular basis. Because of the narrow scope in this expertise, international

[50] *Ibid.*

trade law is not widely taught in schools and colleges and, unlike in the US and the UK, does not constitute a popular option for postgraduate students to specialize in. Hence, there are less law firms specializing in this field and those with this specialization charge exorbitantly high fees for rendering their legal services. This discourages the private sector to hire their legal services and hence to assist the public sector with the legal resources to fight WTO litigation.

The *sixth* and fundamental cause of limitation, which is rather a common one, for adopting this network by developing countries is the emergence of tension between the public sector and the private sector during their collaboration at WTO DSU.[51] This is due to the fact that the government or competent bodies represent their national interest, and not the firms or industries' interest. While, on the other hand, the firms and industries can only see their commercial motives behind the challenge. Hence, this tussle between the competing interests creates tension during the preparation and litigation process between the two players, much to the detriment of the litigation process. It is felt many a times that this model might entrench upon the cosy relationship shared between government and the private sector and might attract criticism and allegations from the general people of the nation. Especially in the context of developing countries, the government and bureaucracy are found to be indifferent towards the commercial needs and interests of the private sector, which impedes the active involvement of the private sector in representing their country at WTO. Hence, it is essential for the government to change its perspective of viewing WTO law as a public international law and observe its growing horizon in the arena of international private law. In this era of globalization, the government should understand that WTO is no more an interstate game play, but that it also influences and affects the private interests.

[51] G. Shaffer, *supra* note 17 at 60.

And, *lastly*, developing countries are facing challenges to implement and adopt this model because of inherent widespread corruption in the public as well as the private structure of developing countries. The widespread corruption embedded in the public sector, in the governmental departments and bureaucracy, is a considerable impediment for the private sector to access the public sector for representing its interests. Lack of awareness of other informal routes to access the public sector, for example CII, FICCI and Ministry of Trade and Commerce in India, also impedes the public-private collaboration in developing countries. Hence, even if a legal mechanism or body is not present in the developing country to represent private sector interests at WTO DSU, the informal mechanisms like Indian CII, FICCI and Ministry can be approached as a gateway for this valuable partnership. Although not viable in the long-run, this can be followed till the time proper mechanisms and authorities are established and legal provisions to the same effect are enacted.

As in most partnerships, there are tensions in this relationship as well. Nonetheless, the complex and legalized nature of WTO DSU fosters the public private partnership to 'work together as partners to advance their separate, but reciprocal goals and objectives.'[52] Although governmental screens will always remain between the bringing of a WTO trade complaint by public sector and the private sector interests at stake, these screens have been and should become more porous and transparent.[53] The Indian Ambassador to the WTO expressed that all the limitations can be overcome and that 'as far as the Indian experience is concerned, we have not experienced any difficulty in working closely with the concerned private stake holders in each case.'[54]

[52] G. Shaffer, *supra* note 17, at 64.
[53] G. Shaffer, *supra* note 17, at 147.
[54] Interview with Ujal Singh Bhatia, Ambassador/ Permanent Representative of India to the WTO, dated 9th April 2010.

It is important to say a line of caution that despite the resources that the private sector offers, it is imperative to keep in mind that these resources are not "free", and the private sector is not interested in rebalancing the trade relations between the countries, having its sole interest in their commercial goals, pushing the government to compel enforcement by a foreign government, showing an indifference towards the goals of WTO law, of reaching amicable and peaceful settlements of trade disputes. This approach often can work to the detriment of transatlantic goodwill and can result in less harmonious international trade relations, if the private sector is granted too great a role in WTO litigation.

'This approach has its own advantages and disadvantages, ranging from the countervailing risks of private capture and bureaucratic rigidity, to the contrasting benefits of dynamic public-private collaboration and rational government oversight.'[55]

VII. CONCLUSION

1.

The significance of WTO DSU as an instrument of international economic governance cannot be challenged in the wake of expanding globalization and industrialisation. The successful and effective settlement of international trade disputes is a crucial element of a "rule based" and "highly legalistic" multilateral trading system, and the DSB and Apellate Body have definitely covered miles of success in developing and establishing this dispute settlement mechanism within WTO, being known as a significant achievement in global impetus towards peace and prosperity.

Like any other institution or organization, the WTO DSU, however remarkable and successful it has been, is far from being accepted as a perfect and ideal institution because of its "tilting pendulum" towards the developed countries, much to the disadvantage of the

[55] G. Shaffer, *supra* note 17 at 149.

developing world. Yet, this imbalanced pendulum does not justify total abandonment or significant amendment of the system, which has proved to be of immense value to international trade fraternity. 'As always, the choice is among imperfect alternatives, including over the design and operation of the judicial system.'[56] The central issue is to identify which alternative is relatively less imperfect.

Power imbalances are inherent in the very framework and operation of the dispute settlement mechanism, functioning to resolve trade disputes between varied economies and structures. '*The key question is how developing countries should adapt to the system, on the one hand, and how the system's rules could be modified or applied so as to reduce structural disadvantages, on the other.*'[57]

There is no dearth of the lengthy lists of reforms and strategies suggested by prominent authors and experts to cultivate the standing of developing countries at WTO DSU. But as a wise man said, 'it is always better to clean ones own house before looking onto others', it seems to me, a more meaningful and valuable contribution, to devise a strategy, which can help developing countries overcome their discussed challenges and obstacles, without modifying or amending the present framework of WTO DSU. With this vision, this research work focuses on devising PPP in context with developing countries, by exploring various ways in which it can be implemented, without recommending any structural reform in the present WTO DSU system, along with the critical analysis of this approach.

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[56] ***N. Komesar, Imperfect Alternatives: Choosing Institutions in Law, Economic and Public Policy, (1994)***.

[57] G. Shaffer, *Weaknesses and Proposed Improvements to the WTO Dispute Settlement System: An Economic and Market-Oriented View*, Draft prepared for WTO at A Look at the Appellate Body, Sao Paulo, Brazil. (May 13, 2005).

The strategy of PPP is already being used in developing countries for various other purposes, like construction of physical infrastructure, establishment of the provision of health and social services, and in the field of public administration, finance, environment protection and academics. After reviewing the creatively established websites by the Government of India[58], it can be derived with confidence that various Governmental Departments and Ministries in India and other developing nations have already established the models of PPP and have constantly been attracting the private sector to come ahead and be their partners in their march towards development and growth.[59]

With all these developments and initiatives taking place seriously and with full efforts, developing countries are evidently and visibly tracing the footsteps of the leaders of this popular partnership, US, EU and Brazil. With this public private collaboration, both the players will maintain a reciprocal relationship of exchanging constitutional, legal, monetary, informative, and administrative and human resources and achieve their respective goals of national integrity and commercial prosperity.

Building the emergence of this network in developing countries for fighting WTO litigation will take some time, although Brazil, being a developing country, has travelled a long way in implementing this PPP model to emerge as a leader at the WTO DSU. It will take enormous efforts and time to establish a legal and regulatory framework, which will guarantee a transparent and credible relationship between the two actors. Yet it is an essential task if we want to make WTO DSU work effectively, along with a "balanced pendulum".

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[58] *Available at* www.pppinindia.com/useful-links.asp and www.hyderabad.aero/airport/partnership.html (accessed on 30th March, 2010).

[59] This partnership model had been actively initiated in India by The Ministry of Finance, Government of India, Committee on Infrastructure, Planning Commission, Investment Commission of India and the India Brand Equity.

This research work intends, as a catalyst, to mark the beginning of an era of further intensive research, towards exploring and designing country-specific models of PPP for the highly heterogeneous and diverse forms of developing countries.